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82-175

In the

Supreme Court of the United States

October Term, 1982

No. ____

United States of America
Respondent

V.

Tommy Swarek
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SAMUEL A. PERRONI
1523 S. Broadway
Little Rock, Arkansas 72202
Telephone: (501) 376-7707

Attorney for Petitioner

QUESTION PRESENTED

1. Whether the standard for determining when a new trial should be granted on the basis of newly discovered evidence is violative of the due process of law clause of the Fifth Amendment to the United States Constitution when a defendant's alleged sole co-conspirator has been rendered unavailable to present exculpatory testimony and evidence at his co-defendant's trial.

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V.

Tommy Swarek
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Tommy Swarek, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed May 7, 1982, is attached hereto as Appendix, Infra, (pp. A1-A). The June 3, 1982, denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B, infra (p. A-7)

JURISDICTION

The judgment of the Court of Appeals was entered May 7, 1982. A timely Petition for rehearing and request for

rehearing en banc was denied June 3, 1982. This Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §371 states that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 33 of the Federal Rules of Criminal Procedure states that:

> The Court on Motion of a Defendant may grant a new trial to him if required in the interest of justice. If trial was by the Court without a jury, the Court on Motion of a Defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A Motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the Court may grant the Motion only on remand of the case. A Motion for new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the Court may fix during the 7-day period.

The Fifth Amendment to the United States Constitution states that:

> **No person shall be deprived of life, liberty or property without due process of law.**

STATEMENT OF THE CASE

The Petitioner, Tommy Swarek, and W. R. Smith, Sr., were jointly indicted by the Grand Jury for the Eastern District of Arkansas and charged with one count each of conspiracy to defraud the United States in violation of 18 U.S.C. §371.

The indictment, in summary form, charged W.R. Smith, Sr., Chairman of the Board of Venture Capital, Inc., a Small Business Investment Company (SBIC) licensed by the Small Business Administration in accordance with the Small Business Investment Act of 1958, with conspiring with Petitioner, a business man and sole shareholder of a corporation which owned various properties including an oil refinery and an unreleased motion picture, in the following respects:

1. W. R. Smith, Sr. and Tommy Swarek unlawfully, willfully and knowingly conspired among themselves, and with other persons unknown to the Grand Jury, to defraud the United States SBA in connection with its SBIC objectives by (a) having Smith, an officer of Venture, make a false entry in an SBA Form 1022A which represented that Venture had increased it's paid-in capital and surplus by $500,000.00 when in fact $400,000.00 of that increase was not bona fide, and therefore not true; and (b) by causing Venture to make two (2) loans to corporations owned by Swarek with those funds being used to purchase a CD to secure Smith's loan from the Planter's Bank of Opelousas; and (c) causing Smith's loan to be deposited in an account at Planters in the name of Venture and utilized as new private capital in Venture, all purportedly in violation of an SBA regulation.

2. As a part of the conspiracy the defendants (a) would negotiate a $400,000.00 loan from the Planter's Bank to Smith and use the proceeds to accomplish a spurious increase in the private paid-in capital and surplus of Venture; (b) would, on November 7, 1977, cause the proceeds of the loan, together

with $100,000.00 from another source, to be deposited in an account of Venture at Planter's Bank and a letter from that Bank to be forwarded to the SBA evidencing such deposit and that the deposit of $500,000.00 represented additional capital of Venture; (c) since Planter's Bank required as additional security a $400,000.00 CD, defendant Smith would cause Venture to make loans to two (2) businesses organized by Swarek to purchase property from a corporation owned and controlled by Swarek; (d) would cause the borrowers to write checks totalling of $400,000.00 to Swarek's corporation and cause that corporation to in turn write a $400,000.00 check to another corporation owned and controlled by Swarek which would then buy a $400,000.00 CD to be placed as collateral on the $400,000.00 loan by Planter's to Smith. The proceeds of the loan would go into the account of Venture and, together with the $100,000.00 deposit from another source, would be represented as new capital in Venture; and (e) would finally fraudently prepare and cause to be prepared and delivered to the SBA an application for funds evidencing that Venture had $500,000.00 in new capital which they knew consisted in part funds deposited in the Venture bank account that had been generated in violation of SBA regulations and which represented a sham and spurious increase in the capital of Venture for the purpose and with the intent of deceiving the SBA in order to obtain funds from the SBA.

The Grand Jury did not indict either Defendant of a substative criminal act.

After the indictment was returned (September, 1979) Smith suffered a complete mental and physical breakdown which caused the trial court to grant several continuances and ultimately a severance, upon motion by the Government, due to the fact that the problems prevented Smith from effectively assisting his counsel in the preparation of his defense. Over Swarek's objection, the trial court continued Smith's case indefinitely and ordered Swarek to stand trial notwithstanding his contention that

the availability of Smith would be essential to his defense and trial preparation.

Swarek was tried and convicted of the charges in the indictment on October 2, 1980. He was subsequently sentenced to a term of imprisonment and a fine. Swarek appealed his conviction and while Swarek's case was pending before the Court of Appeals, Smith was tried on February 17, 1981 on the charges and acquitted.

On November 30, 1981, Swarek filed a Motion for New Trial based upon newly discovered evidence. The trial court denied Swarek's Motion and the Court of Appeals affirmed the trial court's judgment holding that Swarek had not established that the newly discovered evidence (Smith's testimony and cooperation) would probably result in an acquittal on retrial. However, the Court of Appeals held that there was no substance to the government's contention that the jury could have found that Swarek conspired with someone other than Smith (App., infra, p. A-5).

REASONS FOR GRANTING THE WRIT

Swarek's case presents a unique and critical question which has not been addressed by this Court and for which the various Circuit Courts of Appeal are presently without guidance. Swarek's case also presents a fundamental question of procedural due process of law. That question is whether the standard for determining when a new trial should be granted on the basis of newly discovered evidence is violative of the due process clause of the Fifth Amendment to the United States Constitution when a Defendant's alleged co-conspirator has been rendered unavailable to present exculpatory testimony and evidence at his co-defendant's trial.

The historical test governing the prerequisites which must ordinarily be met to justify the granting of a new trial on the basis of newly discovered evidence is undeniably uniform among the circuits. *United States v. Ward*, 544 F.2d 975, 977 (8th Cir. 1976); 2 Wright and Miller, Federal Practice and Procedure §557 (1969). However, new trials on this basis are hardly ever granted since the Petitioners are generally unable to fulfill the first four prerequisites announced by the Eighth Circuit and only rarely the fifth (App., infra, p. A-4), eg, *Coates v. United States*, 174 F.2d 959 (DC Cir. 1949).

This case presents a unique factual situation of significant constitutional dimensions since it seeks to focus on the fifth prerequisite and its application to the complex conspiracy case involving two alleged conspirators. What should be the standard for determining when newly discovered evidence, which meets the first four prerequisites, is "of such a nature, on a new trial, that the evidence would probably produce an acquittal"? This court has not addressed this issue and it is one which has a significant effect on a defendant's right to a fair trial. The Eighth Circuit Court of Appeals, for all practical purposes, held that Swarek met the first four prerequisites but failed

to establish "that the testimony of Smith would probably result in (his) acquittal on a retrial" (App., infra, p. A-4). The Eighth Circuit cited *United States v. Goehring*, 585 F.2d 371, 373 (8th Cir. 1978) in support of this proposition. Under this approach the standard to be applied in such a serious and material instance is a subjective one which imposes upon a defendant the impossible task of proving that with the benefit of the newly discovered evidence he would be acquitted on retrial without giving him the means to present such evidence to a trier of fact.

Judge Learned Hand recognized many years ago that a defendant may have a "lively interest" in securing the testimony of an accused at the trial of another accused. *United States v. Bronson*, 145 F.2d 939, 943 (2nd Cir. 1944). The impact this type of evidence would have in a two person conspiracy case founded entirely on circumstantial evidence is beyond debate. Without Smith's testimony at Swarek's trial there was no way for the jury to conclude anything else but that a false statement existed in an SBA application that Smith signed and that circumstantially at least, Smith knew of its contents and participated in every facet of its creation, preparation and submission. Without Smith's testimony as to what he did and what he knew, Swarek was at an extreme disadvantage. The charge was that Smith and Swarek conspired to submit a false application to the SBA. Under the charge, and the findings of the Eighth Circuit, if Smith did not commit the crime then Swarek could not have committed the crime. In addition, a critical part of the government's case was the allegation, that in effect, the loan providing the additional paid-in capital came from Venture, rather than a third party source.

Accepting, arguendo, that the net result of the transaction as established by the government was unlawful, what then could Smith testify to which would effectively negate the existence of a conspiracy between himself and Swarek to accomplish this unlawful act? First, Smith would testify that he did not know about the CD and the fact that

it was pledged as security for his loan, and was not at the November 7, 1977 meeting where the pledge documents were executed. Secondly, Smith would testify that his loan was a personal one for which he was personally liable. Third, Smith would testify that he didn't submit or cause to be submitted any false information to the SBA since he did not prepare or have anything to do with the preparation of the loan application, and would also testify that, to his knowledge, no false information was submitted or intended to be submitted to the SBA. Fourth, Smith would testify that to his knowledge the loans to purchase the movie and the oil refinery were legitimate loans to purchase real assets. This evidence was not available to Swarek from any other witness and would have had an undeniable impact on the jury at Swarek's trial. Finally, since the government's case was totally circumstantial, the government relied heavily on documentation and other items of circumstance to establish the charges in Swarek's case. There were no other eye witnesses to the alleged conspiracy other than Smith and he is now available to testify on behalf of Swarek at a new trial. Smith is a man of substantial credibility and also processes documentation and other witnesses to support his testimony which was not available to Swarek at the time of Swarek's trial.

If the defendant has the burden of proof in situations such as those in this case, a presumption should exist that the evidence would have made a significant difference and would in all probability produce an acquittal when the defendant satisfies the first four prerequisites, and the burden should then shift to the government to rebut such a presumption. Where reasonable men could differ on the question of the probability of an acquittal on retrial, the decision in such cases should be in favor of a new trial to protect the defendant's right to a full and fair trial. The real question in this case involves an issue of due process of law. Swarek did not have access or even the opportunity to obtain Smith's evidence. That evidence included not only

Smith's denials, which would have been of extreme importance in Swarek's trial since the government relied totally on circumstantial evidence to prove it's conspiracy, but also documents and additional witnesses. The circumstances of this case present the same type of circumstance when a trial court instructs a jury that if it views the evidence in a case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence. The same type of situation is presented to this Court, that is, one of probability of acquittal or probability of conviction. The standard for determining whether the probability of acquittal exists should not be a subjective one having as its foundation a requirement that the defendant prove an acquittal would result without the benefit of a new trial. Swarek was, over his objections, required to defend himself against a complex criminal conspiracy case without benefit of the assistance or testimony of the only alleged co-conspirator. The fraud which Swarek is alleged to have conspired to perpetrate involved transactions between a company wholly owned by the co-conspirator and the Small Business Administration. The Government, during Swarek's trial, was able to set Smith up as a "straw man" and convict Swarek of conspiracy through inference and innuendo with Smith who was not present to offer the most reliable evidence about his own actions.

If the Eighth Circuit Court of Appeals is willing, as they appear to be, to impose upon a defendant the onerous burden of proving, when all other prerequisites have been met, that his newly discovered evidence would probably result in his acquittal on retrial, then the Eighth Circuit would be establishing an improper precedent that will undoubtedly be persuasive on other Circuits which may consider the same issue.

As the use of consipracy charges increases, it is of vital importance that this Court declare a standard to be applied for the granting of new trials on newly discovered evidence which

is not violative of a defendant's right to due process of law and a fair trial.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

SAMUEL A. PERRONI
PERRONI AND RAULS, P.A.
1523 South Broadway
Little Rock, Arkansas 72202
Telephone: (501) 376-7707

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-2339

United States of America, Appellee, v. Tommy Swarek, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: January 15, 1982

Filed: May 7, 1982

Before HENLEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

HENLEY, Circuit Judge.

Tommy Swarek appeals the order of the district court denying his motion for a new trial based on newly discovered evidence. We affirm.

In 1979 appellant Swarek and one William R. Smith, Sr. were charged with conspiring to defraud an agency of the United States, the Small Business Administration (SBA). Shortly after the indictment was returned, Smith began suffering from physical and mental infirmities. Because of these infirmities counsel for Smith moved for a continuance on

three occasions. Swarek joined in these motions. The district court granted the first two continuances requested by the codefendants on this ground, but refused to continue the cause against Swarek an additional time.[1] Instead, the court severed the causes for trial. A jury subsequently found Swarek guilty, and his conviction was affirmed by this court. *United States v. Swarek*, 656 F.2d 331 (8th Cir.), *cert. denied*, 102 S.Ct. 573 (1981). Smith, who eventually recovered, was tried by a jury and acquitted in February, 1981. We briefly set forth the events leading to Swarek's conviction.[2]

In summer, 1977 Smith and his son purchased a majority of the stock of Venture Capital, Inc. (Venture), an investment company organized to provide financing for small businesses and regulated by the SBA. To supplement funds available for loans by investment companies to small businesses, the SBA was authorized to purchase stock issued by such companies provided that the amount purchased did not exceed a specified percentage of the investment company's total paid in capital and paid in surplus. When the sum of paid in capital and paid in surplus was at least $500,000.00, the amount of stock that the SBA was authorized to purchase increased, and the investment company became eligible for matching funds through the sale of this additional stock. In the instant case, co-defendants Swarek and Smith were charged with agreeing to falsely represent to the SBA, on an application for matching funds, that Venture's total paid in capital and paid in surplus exceeded $500,000.00.

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[1]The codenfendants requested an additional continuance on different grounds. It was granted by the district court.

[2]A detailed discussion of the facts is contained in our decision affirming appellant Swarek's conviction. *See United States v. Swarek*, 656 F.2d 331, 333-35 (8th Cir.), *cert. denied*, 102 S.Ct. 573 (1981).

At the time the plan to procure additional funding from the SBA was conceived, Venture had only $297,000.00 in combined paid in capital and paid in surplus. The plan to increase paid in capital and surplus to a minimum of $500,000.00 involved the following circular scheme, riddled with suspect transactions: (1) a bank loaned $400,000.00 to Smith personally; (2) Smith purchased 80,000 shares of Venture stock with the $400,000.00 loan, increasing Venture's paid in capital to $697,000.00; (3) Venture loaned $200,000.00 each to two businesses organized by appellant Swarek; (4) these two businesses used the loan money to purchase purported assets from a corporation in which Swarek was the sole shareholder; (5) this corporation transferred a $400,000.00 check to a second Swarek corporation; (6) the second Swarek corporation purchased a $400,000.00 certificate of deposit from the bank that provided the $400,00.00 loan to Smith; (7) the certificate of deposit and the 80,000 shares of Venture stock were used to secure the loan. *See United States v. Swarek*, 656 F.2d at 334-35.

The application for funding presented to the SBA indicated that Venture had recently received $400,000.00 in paid in capital, which had increased its total paid in capital and paid in surplus to $697,000.00. Relying on the representations contained in the application, the SBA awarded matching funds totaling $697,000.00. These funds ultimately settled in Swarek's hands when they were loaned by Venture to a number of individuals who purchased businesses from appellant.

On the basis of these facts, the government made a persuasive showing, at Swarek's trial, that the claimed $400,000.00 increase in paid in capital was illusory and that "the loan proceeds were placed in the Venture coffers only to acquire SBA funding, and when that was accomplished the money was returned." *United States v. Swarek*, 656 F.2d at 336.

After the United States Supreme Court declined to review appellant's conviction, he filed a motion for a new trial alleging that the testimony given by Smith during the Smith trial constituted newly discovered evidence that entitled him to a new trial. *See* Fed. R. Crim. P. 33. In denying the motion the district court concluded that "there was no testimony in Smith's trial which could have been construed as exculpatory as to Swarek, and certainly not the testimony of Smith." *United States v. Swarek*, No. LR-CR-79-80 (E.D. Ark. Dec. 3, 1981) (order).

We have set forth the criteria for granting a motion for new trial on the ground of newly discovered evidence on numerous occasions. Before such a motion can be granted, the following five criteria must be met:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Ward, 544 F.2d 975, 977 (8th Cir. 1976) (citations omitted); *see United States v. Frye*, 548 F.2d 765, 769 (8th Cir. 1977).

Appellant's contention that he is entitled to a new trial focuses on the last of these requirements. Even assuming, however, that appellant has satisfied the four remaining criteria, we conclude that he has not established that the testimony of Smith would probably result in acquittal on a retrial. *See United States v. Goehring*, 585 F.2d 371, 373 (8th Cir. 1978).

During his trial on the conspiracy charge, Smith denied conspiring with Swarek to defraud the SBA. He testified

that he was unaware of any plan to pledge the certificate of deposit as collateral before signing the loan agreement and did not at any time discuss collateralizing the loan with anything other than the 80,000 shares of Venture stock. In addition, Smith stated that he did not prepare the application for SBA funding but only signed it without examining it. In response to the prosecutor's question, "And your position is that you were an innocent bystander victimized by Mr. Swarek?" he stated: "That is absolutely correct." Appellant now contends that because Smith was indicted on an identical charge alleging an unlawful agreement between only two named individuals, that is, Smith and Swarek, and was acquitted of that charge, Smith's testimony presents a substantial likelihood of appellant's acquittal at a new trial. [3]

After carefully reviewing Smith's testimony and the evidence adduced during Swarek's trial, we conclude that the district court did not abuse its discretion in denying appellant's motion for a new trial. *See United States v. Ward*, 544 F.2d at 977. At the trial of Swarek the defense

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[3] In its brief the government states:

> The words conspired together 'and with other persons' were put in the indictment for a reason. The jury could find that [one or more of several individuals named at trial conspired] with Swarek.
>
> • • •
>
> Smith's testimony does not negate a conspiracy, just that he was not in it . . . . Even if a new jury believes that Smith was an innocent bystander, he would still sink Swarek's ship by putting others on board.

In light of the allegations of the indictment and the proof at both trials, we find that the government's contention is based on nothing more than sheer speculation. Thus, we reject the government's proffered ground in affirming the district court's denial of appellant's motion for a new trial.

submitted to the jury the theory that appellant did not participate in a conspiracy or make any fraudulent representations to the SBA. Despite his testimony, including bland denials of any illegal scheme or intent, and the testimony of several defense witnesses, the jury accepted the government's theory of the case. In light of the evidence of Swarek's unquestionable knowledge of and participation in a scheme engineered only to convince the SBA to part with grant funds for his ultimate benefit, we do not see how Smith's blanket denial of a conspiracy and his testimony placing all the responsibility on appellant would, as a practical matter, produce a different outcome on a retrial. *See United States v. Geders*, 625 F.2d 31, 33 (5th Cir. 1980); *United States v. Panza*, 612 F.2d 432, 441 (9th Cir. 1979), *cert. denied*, 447 U.S. 925 (1980).

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2339	)	September Term, 1981
	)	
	)	
	)	
United States of America,	)	
	)	
Appellee,	)	
	)	Appeal from the United
vs.	)	States District Court for the
	)	Eastern District of Arkansas
Tommy Swarek,	)	
	)	
Appellant.	)	

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Arnold did not take part in the petition for rehearing and rehearing en banc.

June 3, 1982

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No. 82-175

In the Supreme Court of the United States

OCTOBER TERM, 1982

TOMMY SWAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a new trial on the ground that his "newly discovered evidence" would not probably result in an acquittal on retrial.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-175

TOMMY SWAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 677 F.2d 41.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1982. A petition for rehearing was denied on June 3, 1982 (Pet. App. A-7). The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of conspiring to defraud the Small Business Administration, an agency of the United States, in violation of 18 U.S.C. 371. He was sentenced to four years' imprisonment,

with three and one-half years suspended in favor of probation. The court of appeals affirmed, *United States* v. *Swarek*, 656 F.2d 331 (8th Cir.), and this Court denied a petition for a writ of certiorari, 454 U.S. 1034 (1981). Thereafter, petitioner filed a motion for a new trial on the ground that testimony given by a co-defendant, William R. Smith, Sr., at Smith's separate trial constituted newly discovered evidence that entitled petitioner to a new trial.[1] The district court denied petitioner's motion, concluding that " 'there was no testimony in Smith's trial which could have been construed as exculpatory as to [petitioner], and certainly not the testimony of Smith.' " *United States* v. *Swarek*, No. LR-CR-79-80 (E.D. Ark. Dec. 3, 1981) (order), quoted at Pet. App. A-4. The court of appeals affirmed. Pet. App. A-1 to A-6.

The evidence adduced at petitioner's trial showed that in 1977 Smith and his son purchased a majority of the stock of Venture Capital, Inc., an investment company that was licensed by the SBA to provide financing for small businesses. See 15 U.S.C. 681(d). In order to supplement the funds that are available to such companies to make loans to small businesses, the SBA is authorized to purchase debentures or stock issued by the companies, provided that the amount purchased does not exceed a specified percentage of the investment company's total paid in capital and paid in surplus. This percentage increases when the sum of the company's paid in capital and paid in surplus exceeds

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[1]Smith and petitioner were charged in the same indictment with conspiring to defraud the SBA. Shortly after the indictment was returned, Smith began suffering from physical and mental infirmities, as a result of which petitioner and Smith moved for continuances on three separate occasions. The district court granted the first two continuances; it refused to grant the third request and instead severed the cases for trial. After petitioner had been convicted, Smith was acquitted in February 1981. Pet. App. A-1 to A-2.

$500,000. See 15 U.S.C. 683(b), (c). The charges against petitioner and Smith arose out of their alleged agreement falsely to represent to the SBA that Venture's total paid in capital and paid in surplus exceeded the $500,000 minimum. Pet. App. A-2; 656 F.2d at 333-334; Tr. 223.

Petitioner was the sole shareholder of ~~ark-la-tex,~~ ARK-LA-TEX a corporation petitioner had formed to handle his diverse business activities. Among the corporation's alleged assets were a motion picture film and a non-operating oil refinery. In September 1977, petitioner contacted two acquaintances and attempted to persuade them to purchase the movie and the refinery. 656 F. 2d at 334.

Although petitioner was not authorized to negotiate loans from Venture, he promised the two prospective purchasers that if they would form corporations to buy the two assets, Venture would provide the financing. Meanwhile, petitioner explained his plan to Smith and inquired about the possibility of Venture's providing the approximately $400,000 needed to finance the sales. An obstacle to the consummation of the plan, however, was that Venture's paid in capital was only $297,000. Accordingly, Smith suggested, and petitioner agreed, that they seek additional capital by means of a loan from Planters Savings and Trust Bank of Opelousas, Louisiana. 656 F.2d at 334; Tr. 73-77, 120-123, 437.

The scheme that petitioner and Smith devised to obtain the loan and to increase Venture's paid in capital and surplus above the $500,000 minimum, so as to render it eligible for additional SBA funding, involved the following circular transactions, which ultimately were consummated on November 7, 1977: (1) Planters loaned $400,000 to Smith personally; (2) Smith used the $400,000 to purchase 80,000 shares of Venture stock, thereby increasing Venture's paid in capital to $697,000; (3) Venture then loaned $200,000 to each of

the two businesses that petitioner had persuaded to buy his movie and refinery assets; (4) the two businesses paid petitioner's corporation, ARK-LA-TEX, $400,000 for the two assets; (5) ARK-LA-TEX transferred the $400,000 to a second corporation owned by petitioner; (6) this second corporation purchased a $400,000 certificate of deposit from Planters; (7) this certificate and the 80,000 shares of Venture stock purchased by Smith were used to secure the loan. Because Venture, the motion picture corporation, and the oil refinery corporation each had checking accounts at Planters, the money literally never left the bank. Pet. App. A-3; 656 F.2d at 334-335; Tr. 21-23, 25-26, 149-150.[2]

Smith presented his loan application to Planters' loan committee on November 2, 1977. On November 3, 1977, he notified the SBA that Venture was increasing its paid in capital above the $500,000 minimum and wished to apply for additional funding. On November 7, at Smith's and petitioner's request, a Planters loan officer notified the SBA that $500,000 had been deposited in Venture's demand checking account at Planters, $400,000 of which was intended to be used to fund two separate loans. Several days later, Smith and Venture's president met with SBA officials and presented Venture's application for additional funding. The application indicated that Venture had recently received $400,000 in paid in capital, which increased its total paid in capital to over $500,000. Although Venture already had loaned the $400,000 to the two corporations that were purchasing petitioner's assets, the application mentioned only that Venture was considering loaning $200,000 to the oil refinery corporation and made no reference to the loan

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[2]Venture's loan checks to the motion picture and oil refinery businesses were concealed from Venture's president. At Smith's and petitioner's request, a Planters employee agreed to act temporarily as Venture's vice-president and to sign the loan checks. 656 F.2d at 335; Tr. 59-60, 300.

to the motion picture corporation. 656 F.2d at 334-335; Tr. 29-30, 222, 224-227, 233-234, 300-301, 306.

The SBA agreed to provide additional funding and, accordingly, paid Venture $150,000 on December 23, 1977, and $547,000 on January 13, 1978. Soon after the money was deposited, the bulk of it was loaned to provide financing for individuals purchasing carpet businesses owned by petitioner. 656 F.2d at 335; Tr. 171-175, 234, 302-308.

Smith failed to repay the Planters loan when it became due in September 1978, and in April 1979 Planters satisfied the loan by cashing the certificate of deposit that had been given as security. 656 F.2d at 335; Tr. 151.

ARGUMENT

Petitioner contends (Pet. 7-11) that the court of appeals erred in affirming the denial of his motion for a new trial on the ground that he failed to establish that his "newly discovered evidence" would probably result in an acquittal on retrial.[3] There is no conflict among the courts of appeals or with the decisions of this Court concerning the standard applied by the courts below (see Pet. 7), and the application of that standard to the particular facts of this case does not

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[3]Petitioner asserts (Pet. 7) that the court of appeals "for all practical purposes, held that [petitioner] met the first four prerequisites" for the granting of a motion for a new trial on the basis of newly discovered evidence. In fact, however, the court of appeals merely assumed *arguendo* that petitioner's evidence met the following criteria:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; [and] (4) it must be material to the issues involved.

Pet. App. A-4, quoting *United States* v. *Ward*, 544 F.2d 975, 977 (8th Cir. 1976).

present an issue requiring the Court's intervention. In any event, that question was correctly decided below. Further review by this Court therefore is not warranted.

1. As this Court noted in *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19, "the standard generally applied by lower courts in evaluating motions for new trial * * * based on newly discovered evidence" is whether "that newly discovered evidence probably would have resulted in acquittal." See, *e.g.*, *United States* v. *Wright*, 625 F.2d 1017, 1020 (1st Cir. 1980); *United States* v. *Ahern*, 612 F.2d 507, 509 (10th Cir. 1980).[4] Petitioner has provided no authority in support of his suggestion that this now uniform standard should vary depending upon the nature of the particular item of "newly discovered evidence" presented, specifically, that where the newly discovered evidence is the testimony of the second conspirator in a two-person conspiracy case, "a presumption should exist that the evidence would have made a significant difference and would in all probability produce an acquittal when the defendant satisfies the first four prerequisites, and the burden should then shift to the government to rebut such a presumption" (Pet. 9).

Even where the evidence newly discovered by the defendant was all along in the hands of the prosecution, this Court has held that the prosecution's failure to have provided the evidence to the defense constitutes a violation of due process only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, *supra*, 427 U.S. at 112. The trial court thus must balance the weight of the newly discovered evidence against that which was introduced at trial. *Ibid.* By contrast, petitioner's theory requires a *presumption* that his newly discovered evidence would produce a reasonable doubt. But if a defendant

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[4]The cited cases indicate that such a motion is addressed to the discretion of the trial judge.

is not entitled to such a presumption even where the evidence all along was in the hands of the prosecution, he surely is not so entitled where the evidence "simply [is] discovered from a neutral source after trial." *United States* v. *Agurs, supra*, 427 U.S. at 111.

2. Applying the well-established standard for evaluating a motion for a new trial based on newly discovered evidence to the facts of this case, it is clear that Smith's testimony would not probably have resulted in petitioner's acquittal on retrial.

Petitioner claims (Pet. 8-9) that Smith would testify that he knew nothing about the terms of the Planters loan, in particular, that he knew nothing about the certificate of deposit that was pledged as collateral for the loan, because he was not at the November 7 meeting at which the pledge documents were finally executed. Such an assertion, however, is belied by evidence that Smith was present at the November 2 meeting at which the pledge of the CD was discussed (Tr. 458-459) and by evidence of his submission to Planters of the loan application, which included the pledge of the CD as collateral. 656 F. 2d at 334; Tr. 2-23. Petitioner further contends (Pet. 9) that Smith also would testify that "to his knowledge the loans to purchase the movie and the oil refinery were legitimate loans to purchase real assets," that "he [Smith] didn't submit or cause to be submitted any false information to the SBA since he did not prepare or have anything to do with the preparation of the loan application," and that "to his knowledge, no false information was submitted or intended to be submitted to the SBA." But these protestations likewise are severely undermined by the record evidence that Smith and petitioner secured a temporary vice-president for Venture, who wrote the loan checks (Tr. 59-60), and that Smith presented Venture's application for additional funding to the SBA—an application that omitted the fact that Venture already had loaned

$400,000 of Venture's increased capital to the two corporations. 656 F.2d at 335; Tr. 233-234, 306. In view of this substantial evidence that Smith knew of the fraudulent nature of Venture's representations to the SBA, it is clear that his blanket denials on retrial would be unlikely to produce an acquittal of petitioner.

In addition, we note that petitioner's reliance at retrial on Smith's testimony would be severely hampered by petitioner's own testimony at his first trial. For example, contrary to Smith's allegation that he knew nothing about the pledge of the certificate of deposit, petitioner himself testified that Smith was present at the November 2 meeting with Planters bank officials during which petitioner offered to pledge the CD (Tr. 458-459).[5] Similarly, while at petitioner's trial Ronald Pruner, the temporary Venture vice-president, testified that both petitioner and Smith had asked him to sign checks for Venture (Tr. 60), Smith testified at his trial that he had "nothing whatsoever to do" with Pruner's involvement. Tr. 19-20, *United States* v. *Smith*, Case No. LR-CR-79-80-1 (E.D. Ark.). On retrial, Pruner's testimony thus also would contradict Smith's.

At bottom, petitioner is complaining of nothing more than inconsistent verdicts,[6] but there is nothing legally objectionable about such inconsistency. See *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932); *United States* v. *Smallwood*, 443 F.2d 535, 543 (8th Cir. 1971); *United States* v. *Buttram*, 432 F. Supp. 1269, 1273 (W.D. Pa.), aff'd, 568

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[5]Even if petitioner chose not to testify on retrial, his prior testimony could be admitted as a hearsay exception under Fed. R. Evid 804(b)(1).

[6]The court of appeals rejected the government's contention that, because the indictment charged that petitioner and Smith conspired together "and with other persons," there is no inconsistency between an acquittal of Smith and a conviction of petitioner on the conspiracy charge. Pet. App. A-5 n.3.

F. 2d 770 (3d Cir. 1977) (table), cert. denied, 435 U.S. 995 (1978). Even had Smith been tried first and acquitted, petitioner could not prevent his "inconsistent" conviction at his own, separate trial on that account. *Standefer* v. *United States*, 447 U.S. 10 (1980). In these circumstances, the district court did not abuse its discretion in denying petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

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